

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

STATE OF ARKANSAS

V.

NO. CR-2010-968-2

[REDACTED]

2012 MAR 12 PM 12 57
JONIDA EESLEBS
CLERK & RECORDER
BENTON COUNTY, AR
PLAINTIFF
DEFENDANT

FILED

ORDER IMMEDIATELY TRANSFERRING TO JUVENILE DIVISION
AND SETTING INITIAL STATUS HEARING BEFORE JUVENILE COURT

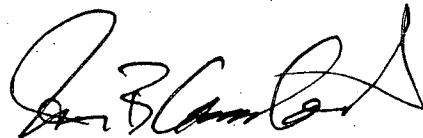
On this 12th day of March, 2012, this matter comes on for decision by the Court on Defendant [REDACTED] Motion to Transfer to Juvenile Division; the Court after several days of hearings, makes Findings In Support of Transfer to Juvenile Division (which are filed separately at this time with the Circuit Clerk) and enters the following orders:

IT IS ORDERED AND DECREED that the above action be immediately transferred from Division II of the Circuit Court (Adult Felony Division) to Division III of the Circuit Court (Juvenile Division) for Benton County.

IT IS FURTHER ORDERED that the Juvenile and his counsel should appear before the Honorable Mark Fryauf, Juvenile Division III, on the 21st day of March, 2012 at 1:30 P.M., Juvenile Justice Center, 1301 Melissa Drive, Bentonville, AR. 72712.

IT IS FURTHER ORDERED that the previously scheduled status hearing set before this Court, Division II, for March 13, 2012 is cancelled and no appearances are required.

IT IS SO ORDERED.



JON B. COMSTOCK, CIRCUIT JUDGE
ENTERED: 3-12-12

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS

STATE OF ARKANSAS

V.

NO. CR-2010-968-2

PLAINTIFF

DEFENDANT

FINDINGS IN SUPPORT OF TRANSFER TO JUVENILE DIVISION

[REDACTED] a juvenile, is the Defendant in this action (herein referred to as [REDACTED], the "Juvenile" or the "Defendant") and is charged as an adult with multiple felonies stemming from several drug "delivery" transactions. The Juvenile seeks to have this matter transferred to the Juvenile Division.

I. Guidepost For The Court – Accommodating Both of Society's Goals

This Court recognizes that any decision requires a weighing of many competing, and sometimes, conflicting factors. Unknowns abound on each side of the equation. Risk is inherent in any decision. But at the end of the day, the ultimate outcome should represent the Court's best effort to fairly and impartially accommodate society's goals, in the most cost efficient way, of assuring future lawful conduct on the part of the youthful offender, which in turn assures that the safety of our community is enhanced.

II. General Discussion and Statutory Reference

The relevant time line applicable to this case is as follows:

- a. Date of the five alleged "delivery" offenses (herein referred to as "the Offenses") occurred between June 16 and July 15, 2010.

- b. As of the date of the first offense, the Defendant was age 17 years, 7 months old and was on juvenile probation for minor offenses.
- c. Defendant's date of birth is November 11, 1992 and he is currently 19 years old.
- d. The charges fall into the following categories:
 - i. 5 counts of delivery of methamphetamine;
 - ii. 2 counts delivery of cocaine;
 - iii. 2 counts for using cell phone
 - iv. 2 counts of possession
 - v. Multiple enhancements due to proximity of park.

██████████ 17 years old when he was booked into the Benton County Jail on July 16, 2010. He spent 68 days in jail before being released on bond.

Pursuant to A.C.A. §9-27-318 (c)(1), the Prosecuting Attorney has elected to charge the Juvenile in the adult criminal division of the Circuit Court. The Juvenile has asked the Court to transfer the matter to the Juvenile Division of the Circuit Court as authorized by A.C.A. §9-27-318 (e) which provides: "Upon motion of the court or of any party, the judge of the division of circuit court in which . . . criminal charges have been filed shall conduct a transfer hearing to determine whether to transfer the case to another division of circuit court. In the transfer hearing, subpart (b) states that the "court shall consider all of the following factors:

- (1) The seriousness of the alleged offense and whether the protection of society requires prosecution in the criminal division of circuit court;

- (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
- (3) Whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted;
- (4) The culpability of the juvenile, including the level of planning and participation in the alleged offense;
- (5) The previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence;
- (6) The sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult;
- (7) Whether there are facilities or programs available to the judge of the juvenile division of circuit court that are likely to rehabilitate the juvenile before the expiration of the juvenile's twenty-first birthday;
- (8) Whether the juvenile acted alone or was part of a group in the commission of the alleged offense;
- (9) Written reports and other materials relating to the juvenile's mental, physical, educational, and social history; and
- (10) Any other factors deemed relevant by the judge."

While the Court may not give the same weight to each factor in any particular case, and is not required to do so as noted by the Arkansas Supreme Court in *Cole v.*

State, 323 Ark. 136 (1996), the “court shall make written findings on all of the factors set forth in subsection (g) of this section” as per 9-27-318 (h)(1). Subpart (h)(2) goes on to advise as to the standard of proof to be applied by the court: “Upon a finding by clear and convincing evidence that a case should be transferred to another division of circuit court, the judge shall enter an order to that effect.” See also, *Magana-Baldamez*, 104 Ark. App. 280 (2009).

While any party may appeal from a transfer order, the Circuit Court’s judgment will be affirmed unless the reviewing court is “left with a definite and firm conviction that the circuit court made a mistake”. *A.I. v. State*, 2010 Ark. App. 83.

The Court will first examine general concepts relative to development status of young offenders, and then will turn to a fact inquiry from the Evidentiary Record as to the ten Arkansas statutory criteria. Our approach to juvenile conduct that we adults find offensive has certainly changed over time. Arkansas has itself gone through a significant change in approach in just the last few years. As reported currently in our local news, conditions in the state’s juvenile justice system have improved considerably, according to a report by the National Center for Youth Law and the National Council on Crime and Delinquency. As noted by a policy analyst at Arkansas Advocates for Children and Families, “Arkansas is well on its way to becoming a national leader in juvenile justice after years of work to reconcile its past.” [Rogers Morning News, Opinion, “*Reforms Deserve Praise*”, February 29, 2011.] While much in the report, captioned “*Arkansas Youth Justice, The Architecture of Reform*” is enlightening and encouraging, a comment under a section, “*Building The Vision*” notes: “**The work of the group was premised**

on what research repeatedly shows: It is more effective and less costly to provide youth in trouble—who do not pose an immediate or significant threat to public safety—with quality community-based programs and supports, rather than taking them away from home and placing them in secure confinement.” The Arkansas Division of Youth Services and the State’s Legislature has recognized the need to consider developmentally appropriate, research-driven solutions for youthful offenders involved in our justice system. By taking account of the growing body of science about young people’s cognitive, social and emotional development, we have been able to leap substantially ahead in the State’s adoption of progressive juvenile and criminal justice policies. We work hard to make those policies and practices align with current research. That research, recognized and embraced by the United States Supreme Court in multiple occasions in just the last several years, [see e.g., *Graham v. Florida*, 130 S.Ct. 2011 (2009)], makes plain that young people are not simply miniature adults. Adolescents in particular are immature in their judgment, assess risks and consequences poorly, are highly susceptible to negative peer pressure, and yet also malleable and uniquely capable of rehabilitation and reformation. This combination of traits bears directly on adolescents’ blameworthiness for criminal conduct and on what sanctions we should impose for that conduct. Only with disciplined effort on our part (the Judges, Prosecuting Attorneys, Probation Officers, Law Enforcement), can we avoid a marked intolerance for adolescent behavior, which, while offensive, does not define the individual to the same extent as a fully-developed and mature adult. We justly recognize that the norm should be to retain a juvenile in the juvenile program. The exception, within the limits of the law, should be limited to those situations where we conclude that

the interests of society cannot be adequately served otherwise. The offense which is the subject of the charge has already occurred. It cannot be undone. The concern for the justice system is what can we do that creates the best "odds" that it won't reoccur. While in a rare case, that analysis will lead us to a decision to incarcerate a young offender in the state's department of corrections for adult offenders, we remain cognizant, even in those cases, that some research informs us that juveniles tried and sentenced as adults are more likely to re-offend after release than juveniles who remain in the juvenile justice system. In any individual decision, the Court has to consider to what extent will an adult prosecution actually deter crime or reduce recidivism, or actually increase the risks to public safety. The highest odds for success are, generally speaking, experienced for those young offenders who are kept at home in their communities with all of the "support" that comes with that practical outcome. Arkansas' juvenile justice system, through the vision and wisdom of our State's legislators, recognizes that troubled kids need to be treated differently from adults in most occasions. They need help and guidance. The Court is guided by the following statement of the Arkansas Legislature:

"The General Assembly recognizes that children are defenseless and that there is no greater moral obligation upon the General Assembly than to provide for the protection of our children and that our child welfare system needs to be strengthened by establishing a clear policy of the state that the best interests of the children must be paramount and shall have precedence at every stage of juvenile court proceeding. . . ."

Thankfully today we are, as a society, much better informed about their patterns of offending and what works. Our judicial decisions should reflect that growth in knowledge.

This Court, though not finding a due process violation, does find it very unfortunate that the State on one hand would expend the resources of taxpaying citizens to "protect" the juvenile from his own poor judgment, while at the same time expending taxpaying citizens' resources to conduct repeated "buys" of controlled substances from the same juvenile. Government has an obligation to be good stewards of the financial resources made available to them. Most government entities, and especially law enforcement, often assert the need for more funds in order to "better protect" the communities they serve. With that plea comes a promise that they will use the taxpayers' funds in the most efficient way possible. Working for a goal of rehabilitation on the one hand through juvenile court and all the collaboration that involves with counselors, probation officers, teachers, family members, prosecutors and the Court itself, and then undermining that same goal by leveraging the misguided judgment of a juvenile with drug abuse problems, is not an efficient use of resources. However, from the Court's perspective, these issues, while worthy of discussion and consideration, represent policy decisions that are within the ambit of the leadership of the Prosecutor's and Benton County Sheriff's Offices, but they do not give rise to Constitutional due process deficiencies, at least as identified by legal authority reviewed by the Court. A reviewing court may certainly reach a different conclusion.

The Evidentiary Record is that the Benton County Sheriff's Office does not have a written policy or standard operating procedure that would provide any guidelines for drug Task Force officers as to what different steps to take, if any, once a suspect is identified as being a juvenile (nor was there any evidence presented that the Prosecutor's Office gives any guidance on this subject). Nor does a policy or guideline exist to

felony charges, with a potential punishment range of eight life sentences and more. The Court observed during closing argument that such conduct was not the norm in the controlled delivery charges that the Court routinely sees presented to it. The State's Attorney noted that that circumstance was explained by the fact that very often the drug deliverer avoids repeated buys in a short time frame out of "suspicion". While that explanation certainly has a ring of common sense, it also highlights the Court's view that this Juvenile was not nearly as "sophisticated or mature" as the State would urge. The normal suspicion that an adult would experience was not raised; Defendant [REDACTED] high level of immaturity likely clouded his ability to appreciate the danger he was creating for himself. (See further discussion of this point below.)

The Court's subjective hope is that the Prosecutor's and Sheriff's Offices will convene members of its own departments and representatives of the Juvenile Court and Probation Office, and defense counsel representatives, to work through the specifics of the contents of any such policy. A motivation to conduct such a discussion could well be the will of the Arkansas Legislature as expressed at A.C.A. §9-27-102, *supra*. While the Court believes that the Prosecutor's and Sheriff's Offices should at least consider the advisability of developing a policy that intentionally determines what processes to follow when a juvenile or a juvenile probationer is the suspect, as noted above, the Court does not find the absence of such a policy to be a violation of any Constitutional due process rights on the part of the Defendant.

B. Evidentiary Record.

Before addressing the statutory criteria, the Court would offer a summary listing of the witnesses who testified in this cause, in the order that they were called to testify:

Defendant's Witnesses:

[REDACTED]
[REDACTED]
3rd Witness – Eva Rousey, NWA Women's Shelter

4th Witness – DeeAnn Baughn, Decision Point

5th Witness – Matt Penquite, Youth Bridge

6th Witness – Michelle Webb, University of Phoenix

State's Witnesses:

1ST Witness – Christy Williford, Arkansas State Crime Lab

2nd Witness – Lize Wilcox, Chemist State Lab

Defendant's Witnesses:

Andrew Shover, Probation Supervisor

Professor Jacques Hill, PhD
[REDACTED]

Scott Tanner, Ombudsman For State of Arkansas, Juvenile


State's Witnesses:

Alejanera Ceballos, the drug "supplier" to the Juvenile. In Federal custody.
[REDACTED]

Officer James Johnson
[REDACTED]

Debbie Pursley, Benton County In-take Probation
[REDACTED]

Officer Travis Newell

 The Court had the opportunity to observe the demeanor and presence of each of the witnesses, and was able to make judgments about their credibility. This is an unusual case from the testimony perspective, because for the most part, there is not conflict, in terms of truth telling, in most of the testimony offered by either party. In such a situation, the Court is required and is able to make judgments as to weight to be given each witness's testimony as it relates to a fact issue that should be evaluated by the Court for the purpose of making a transfer decision. The Court will point this out in the discussion that follows. Most of the real differences in this case, are not so much disputes in whether the testimony was impeached or contradicted, which was rarely even attempted, but the interpretation, weight, persuasiveness and conclusions to be drawn from that testimony.

C. Statutory Criteria:

The Court will now engage in consideration of each element required to be reviewed by the State of Arkansas and make a finding consistent with the Court's view of the Evidentiary Record. The findings below are not meant to be an exhaustive statement of all of the testimony in the Evidentiary Record that supports the Court's conclusions. As noted above, 20 witnesses have testified and over 50 exhibits were introduced. The Court does not have the benefit of a full transcription of the proceedings in this matter, and is relying primarily on the Court's notes made during the hearing.

CATEGORY 1: The seriousness of the alleged offense and whether the protection of society requires prosecution in the criminal division of circuit court:

Finding 1: Giving due consideration to the totality of the circumstances, the Court finds that this factor does not provide support to charging this defendant as an adult. It is not accorded great weight by the Court one way or the other as related to the unique facts of this case. In other drug delivery cases, it may be more compelling, but not in this matter.

The State urges that this is one of the “most important” factors in this case and should be given great weight by the Court, compelling retained jurisdiction by the adult criminal division of the Circuit Court. While acknowledging that the crime alleged – delivery of controlled substance – is not a violent crime, the State seeks to bolster its reliance on this element by emphasizing to the Court the number to separate “buy” transactions – five – and the potential punishment faced by defendant exceeds eight life sentences.

The Juvenile in turn urges that Law Enforcement admits they had strong probable cause to obtain an arrest warrant after the initial transaction – for an individual they had actual knowledge was a juvenile, and constructive notice at a minimum, that he was a juvenile probationer; and that had they made the arrest then, they could have put an immediate end to the the Juvenile’s unlawful conduct, and afforded enhanced protection to the general public and their Confidential Informant. Rather than do that, the State found itself with a very unsophisticated defendant and immature individual (as per discussion in Finding below) who did not have the criminal “smarts” to realize he was being set up by a confidential informant; with a juvenile who had a personal drug abuse addiction issue and was selling quick to make small sums of money from each transaction. Even on the largest “deal” which involved \$1600, the juvenile was only

realizing \$200. Nothing that resulted from the Return of the Search Warrant would suggest that the juvenile was a big-time drug dealer. No large sums of money, expensive jewelry, cars, clothes - none of the normal circumstances one would expect from a genuine drug dealer. It's also not insignificant that the juvenile is a young Hispanic male and the Confidential Informant is a young, attractive Hispanic female. While this strategy to build trust with the juvenile worked for Law Enforcement, it also highlights just how easily influenced the juvenile was in this circumstance. Additionally, there is an admission by the defendant during the police interview that he may have been involved with drugs for several months before the arrest in July; however, no specifics were offered and the Court should not speculate as to what the nature of that involvement may have been.

On balance, the Court believes that this factor does not provide strong support to keep this matter in adult court; but under the unique facts of this case, provides some support for transfer to the juvenile court. There was no logical reason presented by the Evidentiary Record as to why the State went back repeatedly to the Juvenile other than to "layer on" to a vulnerable defendant. In closing argument, the State's Attorney suggested that it was the purpose of gaining access to the Juvenile's supplier. However, though the state called multiple witnesses, several of whom were actively involved in the drug Task Force and the investigation of [REDACTED] not one of them testified in support of that assertion. The State's Attorney did acknowledge that the Evidentiary Record did not contain sworn testimony on that point. The Court will not speculate as to the "why". The Evidentiary Record establishes nothing more than the fact that the supplier showed up, unexpectedly, during the last attempted transaction, when Law Enforcement elected

to execute a previously obtained Search Warrant and to arrest the person later determined to be the supplier.

It is pointed out that the original Information in this cause was filed on July 19, 2010, wherein ten drug-related counts – 5 deliveries and then cell phone usage and possession offenses - were alleged to have occurred over a month's time span. The Juvenile made an oral motion to transfer on August 23, 2010. On September 14, 2010, the State filed an Amended Information in which five additional felonies were added and six enhancement allegations related to location of the Juvenile's home in relationship to a park or church. The Juvenile asserts that the amendment was a form of "punishment" against the Juvenile for asserting his right to ask for a transfer hearing. The State denied the accusation and asserted the amendments were made so "those topics could be discussed or raised at the Transfer Hearing". While the Court takes the statement of the State's Attorney at face value, the Court is unaware of any reason why the State would have been otherwise precluded from bringing up the cell phone usage or the distance from a park or church at the transfer hearing. Additionally, the Prosecuting Attorney is not required to file every potential charge that can be met by the evidence. Prosecutorial discretion, routinely exercised by the Prosecutor's Office in a way that avoids "layering on" of charges against other defendants, was for some reason not exercised in that same way in this case. The explanation for that departure in routine practice is not explained by the Evidentiary Record. While charging decisions are the sole prerogative of the Prosecuting Attorney's office, this Court believes this case demonstrates a need to evaluate the process involved when charging multiple felonies against a juvenile. Are the interests of the State in protecting youthful offenders and the public at large served by the

raw number of felony offenses that can be charged – especially where the State is a very active participant in bringing about the conduct complained of and the juvenile is on probation, which implies he needs help and support? Certainly, if the only goal of the Prosecutor’s Office was to increase the number of charges against individuals, there is a ready pool among individuals with drug addiction problems. These persons are easy “targets” for falling prey to successive “buy” operations, especially where the State provides the “buyer” and the “buy money”. This is even more so given that this Court’s experience is that more than a majority of Division II’s felony criminal docket involves drug charges. At the end of the day however, this approach hardly provides more security to the citizens of Benton County, seems fundamentally harsh in its application, and represents an inefficient use of government resources, and may, at some point, implicate due process.

It should be stressed that this Court is not implying that there was any improper motivation on the part of the Prosecutor’s Office in this matter under consideration or that the Prosecutor’s Office was engaged in procedurally “heavy handed” tactics against the Juvenile. The Evidentiary Record simply does not provide testimony to explain these charging decisions. The Court sees this case as an circumstance that should make all of us, including the Prosecuting Attorney, who are concerned about a fair system of justice, pause and ask the question whether or not the current circumstance really represents the best our system of justice has to offer; or whether further thoughtful and critical analysis is warranted. The Court’s sole point in this discussion is to urge all officers of the Court to step back, reflect and determine if perhaps thoughtful guidelines as to how to manage drug charges against a “juvenile drug user” would be warranted. This Court believes the

answer is “yes” and would welcome the opportunity to be part of that discussion on a broad basis, with the Prosecutor’s Office, other members of the community, including law enforcement, educators and probation officers, and well recognizes that others may have different views on the subject.

The Prosecuting Attorney remains at all times a “minister of justice” within Arkansas’ criminal justice system. In that role, the Prosecuting Attorney is well aware that he may not make charging decisions solely for the purpose of punishing a defendant for asserting a statutory or Constitutional right. The Court need not (and really cannot without hearing testimony on the subject which is not part of the Evidentiary Record), resolve this dispute as to the motive for filing the Amended Information, as it does not aid in the ultimate decision being made by the Court today.

The State does discuss the potential harm to the State by the criminal conduct of the Juvenile. Whatever risk of harm was presented is now past. Whatever risk of physical harm existed was occasioned in part by the State providing the buy money and an untrained lay person to take the role of “buyer” in multiple drug deals. The Court notes that the lay confidential informant was required to sign a contract holding the State harmless if she were hurt or killed in any one of these transactions. Common sense tells all of us in the criminal justice system that drug “deals” are notoriously unpredictable; very often because the police often do not know all of the players involved or whether there are firearms present. In this case, there is nothing in the Evidentiary Record from which the Court is advised that Law Enforcement knew that the Juvenile was not a physical threat to anyone and did not have a firearm. What Law Enforcement would reasonably surmise is that the Juvenile had a source, whose identity was unknown, whose

level of potential for lethal violence was unknown, who could well present a risk of death to the Juvenile and the Confidential Informant (CI). Knowing that these risks were unknowns, and being aware that the CI was a fairly unsophisticated young female who simply wanted to help another friend get out of jail, the State still elected to set up multiple transactions. It's not at all clear to the Court why the State urges on the one hand its stated concern that the risk to the public caused by the Juvenile's willingness to "deliver" the drugs on five occasions is to be avoided, and yet it was the State alone who had the ability to eliminate that risk by making an arrest of the Juvenile after the first transaction. For reasons not part of the Evidentiary Record and not known to this court, the State elected to allow the Juvenile to continue to operate in an environment where he was likely having access to a "supplier", and he and the lay informant remained potential victims of a person, the character of whom was entirely unknown to the State. As an aside, the Record does show that the "supplier", normally the actor most sought after by Law Enforcement, received a sentence that runs concurrent with a current Federal sentence, and ultimately serves no additional prison time as a result of his transactions with Almaraz.

For the above reasons and those stated below, the severity of the crime cuts both ways. Also, as to the need to "protect society" going forward, the Evidentiary Record contains no history of violence on the part of the Juvenile and demonstrates that he has avoided drug use for an extended period of time. Ultimately, it is the Court's view that society's goal of security will be adequately served by transferring this matter to the Juvenile Division.

CATEGORY 2: Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner:

FINDING 2: The State and Defendant agree the conduct complained of was not aggressive or violent. Both however acknowledge it was premeditated and willful in manner. The Evidentiary Record shows that a Confidential Informant communicated by cell phone with the defendant to make a drug purchase. On each occasion, the CI appears at the defendant's residence where he lives with his mother and other family members. The garage door is opened and drugs and money are exchanged following text communication. In assessing this category in the unique facts of this case, the Court would agree with the State that defendant's conduct would provide some support to retaining this matter in criminal division. For reasons made clear in the discussion of Finding 4 below however, the Court does not give this factor significant weight in the context of this case.

CATEGORY 3: Whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted.

FINDING 3: Both parties agree the offense was not against a person or property and this category is given no weight in the Court's determination.

CATEGORY 4: The culpability of the juvenile, including the level of planning and participation in the alleged offense.

FINDING 4: This category is very similar to that of "premediation" and "willful". Certainly, on the one hand, the Evidentiary Record demonstrates the juvenile's clear culpability, planning and participation in the matter. But that is only half the story.

This Juvenile was already under the care and protection of juvenile probation for minor misdemeanor offenses – drug paraphernalia and alcohol; in addition, he had had a recent methamphetamine-positive test result. His demeanor to this Court, which has been observed now for over a 12-hour period (given the 3 + days of evidentiary hearing), would make clear to even a casual observer that he is small in stature (reference to height of 5 foot 4 inches and weight of 130 pounds) and presents himself in a meek and mild manner. Even the interviewing police officer commented on his politeness during the interrogation that resulted in multiple admissions. In the totality of the circumstances, the State provided buy money and a CI in the person of a young Hispanic female whose sole purpose and intent, which purpose and intent was shared by Law Enforcement, was to lure a juvenile already determined by the juvenile court as being in a vulnerable state and in need of help from probation services in order to get back on a law-abiding path, to engage in repeated illegal drug transaction. From the Court's perspective, the repeated willingness of the juvenile to engage in these "buys", his failure to be appropriately alert to the risk involved (which suspicion the State's Attorney acknowledge often prevents Law Enforcement from succeeding at multiple buy attempts from adults), and the other factors above, causes this Court not to give this factor much weight in reaching its ultimate conclusion. Individual culpability is certainly present, but its appropriate weight is negligible in the Court's final analysis. This is especially so when the Juvenile took responsibility for his actions during the police interview, and has for over a year been on a consistent path of rehabilitation.

CATEGORY 5: The previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were

against persons or property, and any other previous history of antisocial behavior or patterns of physical violence:

FINDING 5: This factor does not weigh heavily in the Court's view. While there is previous juvenile history, given the fact that the Juvenile was on probation, it was limited to non-violent misdemeanor offenses. There is no history of antisocial behavior or patterns of physical violence from the Evidentiary Record.

CATEGORY 6: The sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult:

FINDING 6: The Court finds that this factor does not support charging this defendant as an adult, but rather supports a juvenile adjudication. The State asserts that the uncontroverted evidence from the defendant's own witnesses show the juvenile to be very sophisticated and mature, and wanting to be treated as an adult. At one point the State argued that the juvenile's long employment record demonstrates these traits. The Court believes such an interpretation fails to take into consideration the full context of each witness' testimony and the time frames involved.

The Evidentiary Record demonstrates clearly and convincingly to this Court that this Juvenile has made a complete turnaround in his life since the July 2010 arrest. It appears the 68 days in Benton County Jail, have allowed him to "dry out" from his drug usage and to assess his life's direction. From all accounts, to be discussed, he is one of the better candidates this Court has seen for a life that is successful in the most holistic use of that term. Before being arrested, the same could not be said of the Juvenile. From the Court's perspective, formed from watching him in open court during three days of

evidentiary hearing, observing him in the video police interview and hearing the other witnesses testify as to his characteristics, this defendant has a maturity level that is age appropriate. He is not an adult.

The terms "sophistication" and "maturity" must be recognized as highly relative terms. Had [REDACTED] the sophistication and maturity of an adult, he likely would not have succumbed to the pressure for repeated sales to the same person in such a short period of time (as noted by the State's Attorney); if he were in fact the sophisticated drug dealer suggested by the State, then it is surprising that he waived his right to remain silent and is fully responsive during the police interrogation; his conduct is more indicative of a "small fish" not a person who is at the "helm of a major drug operation" (See State's Amended Response). If he were running a sophisticated drug operation, then one would also have expected the Return of the executed Search Warrant to show obvious signs of "wealth" associated with major drug dealers. That is absent from the Evidentiary Record.

Certainly, the Juvenile [REDACTED], particularly since his arrest in this matter, has demonstrated a level of maturity that is much greater than his conduct evidenced in July 2010. This would include his employment status, his efforts to get a college education, his participation in counseling. While these certainly demonstrate that he is now making good judgments for himself, the Court does not believe the defendant he has observed throughout these proceedings should be or even acts as a formed adult. He remains a youthful offender who needs the support and encouragement that can and will be provided by probation services.

CATEGORY 7: Whether there are facilities or programs available to the judge of the juvenile division of circuit court that are likely to rehabilitate the juvenile before the expiration of the juvenile's twenty-first birthday:

FINDING 7: This factor is given substantial weight by the Court and of all the factors is one of the strongest in persuading this Court that the fair and impartial application of the law to this defendant, compels this court to transfer this matter to the Juvenile Division. From the Court's perspective, this factor is trying to help answer the question of whether or not the juvenile is a good candidate for rehabilitation within the ability of the juvenile division to provide services (and inherent in that inquiry, is whether or not the public safety concerns of the State can be satisfactorily met by a juvenile transfer). The State in its Amended reply to the motion to transfer states its position, "It is the State's position that all available resources have been exhausted and that Defendant will not be able to benefit from further services from the juvenile system." The Court disagrees strongly with that conclusion. The State is right to point out that there has been some juvenile court involvement, but the only delinquent findings were misdemeanor paraphernalia and alcohol, and a ten-day period of detention relative to probation violation due to a single positive drug test. Though there were multiple witnesses who were connected one way or the other with juvenile probation and law enforcement officers who had experience with juveniles, not one of these witnesses was ever asked by the State's attorney, "am I correct that there are no further services that can be provided by the juvenile systems that would assist the defendant?" The Evidentiary Record is devoid of any testimony that would allow the Court to make a finding of fact consistent with the State's argument.

In fact, the Evidentiary Record is very much to the contrary. There are several aspects of the testimony that the Court finds persuasive on this point. First, the Court focuses on the time frame of the arrest in July 2010. While that time period is past, this court believes it is worthwhile to contemplate what services would have been available, the goal of those services and what is the likelihood that the Juvenile [REDACTED] would have taken advantage of them. In many cases, the Court has nothing but speculation. But believing that actions speak very loud, the Evidentiary Record has the demonstrated conduct of [REDACTED] since his release from the Benton County Jail after 68 days of confinement. Even the State's Attorney agreed in closing statement that on the face of it, it would appear that the juvenile's conduct was exemplary. Consider the following: a witness from community college described his active participation in trying to achieve a college education and described his active level of effort; a witness from the University of Phoenix added further corroboration to the juvenile's goal to improve his life; even one biology professor, who noted the grade earned was a C, noted that no student could achieve such success in his class without being very committed; each of these witnesses described the juvenile in glowing terms. Even when the Court made inquiry as to their assessment of the juvenile's "sincerity", the responses were uniformly positive or neutral, but none were negative. Testimony from an employer described the juvenile's work in a local restaurant as being "one of my best servers". This is a current full time job. The goal of juvenile services would be to engage a juvenile to complete their education and employment goals and to help a juvenile remain law-abiding. Rather than acknowledge and congratulate the juvenile for these decisions, which undoubtedly were directly related to the wake-up message that finally appears to have been understood by the

juvenile after his arrest and lengthy detention, the State's Attorney argues that this self-motivated effort itself demonstrates that there is nothing left for the juvenile division to provide this juvenile. The Court respectfully disagrees. The history of juvenile justice informs us that vulnerable juveniles who do "good things" are not "out of the woods." They remain at risk. This Court is persuaded that the need for continued support for the Juvenile [REDACTED] is real and essential, not just desirable or optional. The Evidentiary Record describes an extremely oppressive childhood home that [REDACTED] grew up in; the level of violence towards his mother by his Father would be heart-rendering to even the casually concerned person. But the community of Benton County – its citizens – are more than casually concerned about the mental and physical health of young people in their community. Here the Evidentiary Record shows that this juvenile is very amenable and willing to receive and take advantage of services that may be made available to him. A single but important example is his own pursuit of drug counseling. One probation officer noted that [REDACTED] had received 59 drug screens and only tested positive one time. He pointed out that this number of screenings was high by any comparison, as most offenders will routinely have a much smaller number of screenings. Of any young person who has appeared in front of this Court, [REDACTED] strikes this Court as perhaps the single best candidate for further and continued rehabilitation. The likelihood of success is high; the risk of failure, while always present, is slight in the judgment of this court.

The State's attorney argues that none of this past conduct should be considered by the Court; that it is more properly a factor of sentencing when that stage of the case is presented. For the reasons noted above, the Court disagrees. Certainly, it would be relevant to the sentencing stage. But since it gives insight into the juvenile's amenability

to accept juvenile services, it is relevant to the current inquiry as well. The Court can well image a fact scenario where the evidence presents a juvenile who, by both his conduct and his words, makes it explicitly clear to all involved that he has no desire to change his life, no desire to become law-abiding, and no intention to participate meaningfully in any services offered. That is not the evidence in this case, and the Court does not understand the State to contend otherwise.

The Court comes to this same conclusion when focusing on the time frame of today. Admittedly, the clock is ticking, and there is limited time between now and the juvenile's twenty-first birthday. The immediate issue this court must grapple with is whether or not there are available resources that can be provided by the Juvenile Court to fully rehabilitate the Defendant before he reaches age 21 – which birth date will result in the Juvenile Court's loss of further jurisdiction over the defendant; or, whether the Defendant should be tried as an adult in which event the State of Arkansas would potentially have jurisdiction over him for a much longer period of time.

In addition to resource availability, the Court believes it needs to be fully informed of at least the following which would aid in its determination:

- a. What is the likelihood that the Defendant will take advantage of the juvenile court's resources?
- b. What is the potential for family, friends, counselor support?
- c. Any employment or employer support?
- d. What of teachers or school report?
- e. What of juvenile probation officers' opinions?

f. What resources does the State offer adults that are different than what is available to a defendant in juvenile court?

As to likelihood that the juvenile will take advantage of whatever services are offered to him by the Juvenile Division, the Court's discussion above makes clear it views that the likelihood is extremely high. In fact, there is nothing in the Evidentiary Record that would allow a reasonable fact finder to entertain any doubt in the matter. [REDACTED] is on a path to improve his life. He is aggressively and consistently taking steps to improve his life – and thus improve his status within society at large.

As to the potential for support from family, counselors, and teachers, the Evidentiary Record provides the same report. While it was concerning to the State that the juvenile's mother has avoided direct conversations with her son on the topic of his conduct and his arrest, and perhaps even his level of criminal culpability, the Court was impressed with her genuineness and apparent uprightness. The Court is satisfied that her eyes have been opened, and she will be more transparent with her son. Tough conversations should not be avoided. She does however provide a great role model for her son. He is fortunate to have her. The Court agrees with the observations of Defendant's Attorney when he noted she is "doing the best she can." She is to be commended for her efforts. Additionally, the Court understands from counsel's questions to the Mother, that he had advised her not to talk to her son about the matter. While her answer was somewhat ambiguous, the Court accepts counsel's implicit representation, as an officer of the Court, that he in fact gave that advice. It should also be noted that

██████████ himself is a young father of a young child (less than a year old), and is providing financial support to the child and the child's mother. The child's mother described him as very caring for their child and her. As to counselors and friends, perhaps one of the impressive witnesses to the Court was a police officer James Johnson from Lowell who described his previous encounters with ██████████ before his arrest and since. On balance, this officer, who was called by the State as a witness, described his relationship with ██████████. While describing him as a mentor would overstate the testimony, Officer Johnson took the opportunity to portray a good role model and advisor. Kids matter to Officer Johnson. He is commended by the Court for his obvious concern for the welfare and future of ██████████. He avoided stereotypes and cynicism. Officer Johnson recognized early on that much of ██████████'s issues were directly related to the group of people he associated with – who may have had a gang nomenclature attached to them – they were not “good people”. The Officer informs the Court he has no reason to believe that ██████████ continues any association with that “bad crowd”. He pointedly acknowledged that he is “proud” and glad for the progress ██████████ has made in his life and has personally told ██████████ that when he saw him out in public. Officer Johnson believes ██████████ “has come a long way” and has lots of potential.

As an aside, the Court would note that the “potential” of ██████████ to lead a good life was shared by multiple witnesses. As a further aside, the Court would note that juvenile counselors and drug counselors consistently advise that perhaps the single greatest factor in “turning around your life” is to disassociate from

those persons who are a bad influence on you. From the Evidentiary Record, [REDACTED] has followed that admonition and is benefiting from it. So is his girlfriend, his daughter, his Mother and society in general.

As to employers, the positive feedback has been discussed. There is nothing that would raise a doubt about whether he would continue being employed and being an asset wherever he worked.

As to teachers, the Court has already discussed their glowing comments about the Defendant. The Court believes that any teacher can quickly determine whether a student is "going through the motions" or is engaged. To a person, [REDACTED] was described as being engaged. They enjoyed his participation in their class.

As to juvenile probation services, several witnesses employed at state or local level in the juvenile probation area testified. To a person, they were emphatic that all of the services that are made available for any juvenile (and there are a myriad of them), would remain available to [REDACTED] with the only exception of two; and that was in-house treatment for drug dependency or psychological issues. As to those two categories, there was general consensus that nothing demonstrated to anyone the "need" for either of those for [REDACTED]. The State does not assert otherwise. The Court's biggest take-away from listening to the juvenile probation witnesses is that the entire effort of the juvenile system is a very determined and disciplined approach of collaboration among teachers, counselors, probation, family members, the Juvenile Judge and prosecutors to come up with "development plans" that are tailored to each young

person that comes before them. Their approach requires and welcomes imaginative solutions; it's not "one size fits all". In the Court's view, there was no effort on the part of the State to impeach any of the substantive testimony of these witnesses. During closing argument, the State did mention that no witness said what precise service would be offered to [REDACTED]. What stands out in the Court's recall and what the Court took from their testimony was that after the transfer to the juvenile division, the Court and the probation office would get together and map that out with the juvenile and his family. All potential services, other than as noted above, would be on the table.

As to whether or not the adult correctional system would offer some service that was different or better than that which could be provided by the Juvenile Division before [REDACTED] reaches age 21, the State offered no testimony from any witness.

CATEGORY 8: Whether the juvenile acted alone or was part of a group in the commission of the alleged offense:

FINDING 8: In one sense, the defendant acted alone, as his was the sole purpose to "deliver" the drugs to the confidential informant. On the other hand, there is a whole cast of persons who actively facilitated the juvenile's culpability in the commission of these crimes, inclusive of the supplier, the confidential lay informant and Law Enforcement. This is certainly not to suggest that these persons (other than the supplier) shared in any criminal culpability, but the particular offenses charged would not have occurred without their active

participation. On balance, the Court gives this factor little weight in the context of the decision being made.

CATEGORY 9: Written reports and other materials relating to the juvenile's mental, physical, educational, and social history:

FINDING 9: Both parties agree this category is not really a factor one way or the other. The Court concurs.

CATEGORY 10: Any other factors deemed relevant by the judge.

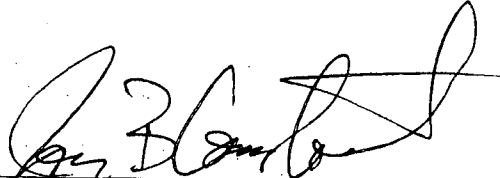
FINDING 10: The Court adopts all of the discussion set forth herein and as noted on the record during the proceedings. Additionally, the State argues that the Court should consider that, given his present age, there is limited opportunity for the Juvenile Division to provide rehabilitative services. The Court notes that the first request for a transfer to juvenile division was made by the juvenile's attorney at the time of the initial Circuit Court arraignment on August 23, 2010. It is unfortunate that it has taken so long for this matter to be heard by the Court, but the Court is not inclined to use that as a factor against the juvenile. Our system of justice has an obligation to dispose of matters in a timely fashion. By reason of the fact that the Court believes there is ample time to supplement the "support" [REDACTED] needs to keep on his current path of rehabilitation, the Court does not weigh this factor in support of continued jurisdiction in adult court.

Conclusion:

In conclusion, this Court is persuaded by more than just clear and convincing evidence, that the juvenile [REDACTED] is on the path to building a law-abiding life for himself and his family. He is at a "tipping point" that the Court concludes should be weighted in support of an immediate transfer to the Juvenile Division. This is the best outcome for [REDACTED], and it is the best outcome for the public's safety. Sending this young man to the adult system, including potentially the Department of Corrections, is not the right thing to do to him or society. To keep him on the path of lawfulness, he needs and the Court is satisfied, he will avail himself of the services offered by the Juvenile Division. Certainly, this Court cannot presume to know necessarily what [REDACTED] future conduct will be. It would be absurd to hold any court to that measure of predictability. But what this Court can and should do is to make its best judgment, applying the law in a fair and impartial manner, as to whether the Court is so persuaded by the clear and convincing evidence – presented by the testimony of 20 witnesses who appeared and testified in open court. The Court today does that.

The Court will enter a separate order of transfer to the Juvenile Division and will schedule a first appearance before the Juvenile Division.

Entered this 12 day of March, 2012.


JON B. COMSTOCK, CIRCUIT JUDGE